Neutral Citation Number: [2021] EWHC 850 (Ch)

Case No: BL-2020-MAN-000120

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS AT MANCHESTER
BUSINESS LIST (Ch)

Manchester Civil Justice Centre
1 Bridge Street West,
Manchester M60 9DJ

Date: 9 April 2021

Before :

HIS HONOUR JUDGE CAWSON QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between :

889 TRADING LIMITED **Claimant**

- and –

(1) CLYDESDALE BANK PLC
(2) PETER CHARLES KELLY
(3) DAVID JOSEPH DUFFY
(4) GAVIN RODNEY OPPERMAN
(5) DAVID JONATHAN BENNETT **Defendants**

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David William Taylor the Managing Director of the Claimant on its behalf
Ian Wilson QC (instructed by **DLA Piper UK LLP**) for the Defendants

Hearing date: 29 March 2021

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

....

HHJ CAWSON QC

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, and by release to BAILII.

The date and time for hand-down is deemed to be 10.30 a.m. on Friday 9 April 2021

His Honour Judge Cawson QC:

Introduction

1. I am presently concerned with two applications:

    i) The Defendants' application dated 4 February 2021 seeking to strike out the Claim Form and the Particulars of Claim pursuant to CPR 3.4(2)(a) and (b) (**"the Strike Out Application"**);

    ii) The Claimant's application dated 8 February 2021 seeking disclosure pursuant to CPR Part 31 and s. 7 of the Bankers Books Evidence Act 1879 ("**the Disclosure Application**").

2. The present proceedings are the latest instalment of a long running dispute between the Claimant (**"889"**) and the First Defendant (**"the Bank"**) relating back to the circumstances in which the Bank granted 889 loan facilities in 2007.

3. This is the second set of proceedings that 889 has brought relating to such matters. In April 2018, while represented by solicitors and Counsel, 889 issued Claim No. E30MA245 (**"the First Proceedings"**) against the Bank and the LPA Receivers referred to below. It is not in dispute that in those proceedings, 889 made a number of claims that overlap with those that it now seeks to advance in these proceedings, but it has also joined as Defendants to the present proceedings Peter Charles Kelly ("**Mr Kelly**"), a former bank employee (the Second Defendant), the Bank's current CEO (the Third Defendant), the Bank's Business Director (the Fourth Defendant) and the Bank's Chair (the Fifth Defendant).

4. The First Proceedings were struck out in October 2018 when 889 failed to comply with an unless order.

5. By the Strike Out Application the Defendants seek an order striking out the Claim Form and Particulars of Claim under CPR 3.4(2)(a) and/or (b). They do so on the basis that the present proceedings duplicate claims advanced in the First Proceedings in circumstances in which it is said that it would amount to an abuse of process for 889 to be permitted to prosecute them again in the present proceedings, and that in any event and/or to the extent that they do not overlap with the First Proceedings, the present proceedings fail properly to set out valid claims against the Defendants.

6. 889 has, at all relevant times, been represented by its Managing Director, David William Taylor ("**Mr Taylor**"). In addition to causing 889 to commence the First Proceedings and now the present proceedings, Mr Taylor has also engaged in what might fairly be described as a broader campaign against the Bank and a number of individuals connected with it. This campaign has included the sending of forthright letters and emails, as well as making complaints to the police, members of parliament and regulatory bodies, including the Financial Conduct Authority ("**the FCA**").

7. Mr Taylor maintains that the Bank's conduct, and in particular the conduct of Mr Kelly in relation to the original grant of facilities to 889 in 2007 in, so it is alleged, making

misrepresentations concerning the contents of valuation reports was tainted by fraud, and that Mr Kelly and other representatives of the Bank subsequently engaged in a dishonest failure to disclose relevant documentation concerning those alleged misrepresentations, and in particular the contents of a memorandum and a file note, both dated 10 April 2007 (“**the 2007 Documents**”).

8. Shortly before issuing this claim, 889 made an application for pre-action disclosure in respect of the 2007 Documents which was dismissed by DDJ Brightwell on 27 January 2021. The 2007 Documents, form the subject matter of the Disclosure Application, along with other documentation in respect of which 889 seeks disclosure.

9. The Defendants were represented before me by Mr Ian Wilson QC, and Mr Taylor represented 889. In addition to oral submissions at the hearing, I have the benefit of a skeleton argument prepared by Mr Wilson QC (and Mr Richard Hanke of Counsel), and a skeleton argument and supplemental skeleton argument prepared by Mr Taylor. I am grateful to both Mr Wilson QC and Mr Taylor for their helpful oral and written submissions.

The Background

10. It is necessary to go into the background to the present proceedings in rather more detail.

11. 889 was incorporated on 23 March 2007 as a special purpose vehicle to acquire and generate income from a property on Higginshaw Lane, Oldham (**"the Property"**). The Property and the subsequent business of 889 were supported by loans from the Bank that were secured by a debenture dated 19 April 2007 granted by 889 ("**the Debenture"**) and a mortgage over the Property dated 26 April 2007 (**"the Mortgage"**). The Property was occupied by a sister company of 889, T.T. Express (Oldham) Ltd (**"TTX"**), which operated a haulage business.

12. So far as the initial acquisition of the Property is concerned the Bank funded £800,000 of the total purchase price of some £2.27m. Prior thereto, the Bank had sought and obtained valuation reports. In particular in an initial report (“**the First L&S Report**”), Lamb and Swift had advised that the market value of the Property was £800,000, but that the Property did not provide good security for the proposed advance. The Property was then valued by Morris Dean who placed a value on the Property of £1.2 million. However, the Bank was not happy with the methodology of the latter report, and so went back to Lamb & Swift who advised that the Property had a value of £2 million with planning permission, and £1.3 million without planning permission. It is the Bank’s case that it relied upon the latter report in making its lending decision.

13. On 28 February 2017, 889 did not pay interest that the Bank maintained had accrued and was due to the Bank. Consequently, on 3 March 2017, the Bank made a formal demand for repayment, which was not met.

14. On 6 March 2017, the Bank appointed LPA Receivers (**"the LPA Receivers"**) over the Property.

15. Since the appointment of the LPA Receivers, Mr Taylor has, as already touched upon, made multiple complaints to the Bank and has sent, and continues to send, a large

volume of correspondence to current and former Bank personnel (including its senior management) and various third parties. This has included senior figures in the Government (e.g. the Chancellor and the Business Secretary), the FCA, the Bank of England, the police and the Serious Fraud Office.

16. In August 2017, Mr Taylor made a complaint to Greater Manchester Police ("**GMP**") that he had been defrauded by the Bank. This complaint was investigated at some length by GMP. During the course of GMP's investigations, the Bank voluntarily provided documentation to GMP, including copies of the 2007 Documents.

17. In September 2018 GMP concluded their investigations and decided to take no further action. The Bank has put GMP's "Investigation Summary" in evidence. This makes reference in paragraphs 9 and 10 thereof to the 2007 Documents. Paragraph 10 of the Investigation Summary refers to the file note dated 10 April 2007 sent by Mr Kelly internally within the Bank, observing that this file note referred to the First L&S Report and commented that: *"Without the benefit of detailed planning consent on the site and because of other issues, they were not prepared to give a value of the site in its current condition".* The Investigation Summary observed that: *"The commentary is misleading since it conflicts with the L&S report itself, which states in para 13 that the current Market Value of the property in its current condition is £800,000. It supports DT's allegation that the Bank told him that L&S wouldn't put a value on it and did not disclose the valuation to him."*

18. However, the report concluded that there was insufficient evidence for *"a reasonable prospect of conviction against Peter Kelly."*

19. In the meantime, on 12 April 2018, 889 had issued the First Proceedings in the High Court in Manchester against the Bank and the LPA Receivers. The issue of that claim followed pre-action correspondence between solicitors for 889 and the Bank. The issues raised by the First Proceedings are addressed in some detail below.

20. After issuing the First Proceedings, 889 applied for an interim injunction to restrain the proposed sale of the Property. On 11 May 2018 this application was dismissed by HHJ Eyre QC. Costs were awarded in favour of the Bank, summarily assessed in an amount of £22,500. These costs have not been paid by 889.

21. On 23 November 2018 the LPA Receivers sold the Property to a third party.

22. Shortly after the unsuccessful application for an injunction to restrain sale, on 21 June 2018, 889's solicitors ceased to act for it, and 889 has thereafter acted through Mr Taylor.

23. On 23 August 2018, the Bank received a document purporting to be a default judgment. I shall return to this document, but it is clear that it is no such thing, and Mr Taylor does not dispute that he was responsible for it being sent to the Court, where it was stamped as received by the Court to lend it some authenticity. However, Mr Taylor now says that he accepts that it was a mistake to seek to rely upon any such document.

24. 889 then failed to file a Directions Questionnaire as required by the CPR. Therefore, also on 23 August 2018, the court made an order requiring 889 to lodge its Directions Questionnaire by 4.00pm on 14 September 2018. It failed to do so. Consequently, on 20

September 2018 (the relevant order in fact being sealed on 3 October 2018), District Judge Khan ordered that *unless* 889 filed a Directions Questionnaire by 4.00pm on 17 October 2018, the claim would be struck out by the order and judgment would be entered for the Defendants.

25. 889 continued to fail to file its Directions Questionnaire, and did not do so by the time provided for. Instead, it filed a document signed by Mr Taylor with *"4pm Wednesday 17 October 2018"* typed below his signature at the end thereof. This document included the following text:

> *"Response to threat by District Judge Khan to retrospectively strike out Claim E30MA245 and "enter judgment" in favour of "the Defendant" unless by 4pm on Wednesday 17 October 2018 the Claimant, 889 Trading Limited, represented by Taylor Price Solicitors and heard by counsel, lodges "the requisite Directions Questionnaire …….*

> "*The court file shows a miscellaneous letter from Michael Lees dated 23 August 2018, which is erroneous. There is an application to amend to add the bank as defendant at its address for service in Glasgow dated 8 August 2018, endorsed by a Chancery Judge. There is a certificate of service of the claim form and certificate of service of notification of the entry of judgment on 22 August 2018. The Chancery Division has confirmed it has not heard from the bank since service on 8 August 2018. It has confirmed it was wrong to ask for a directions questionnaire. It has asked for a note in writing that neither side have asked for a trial."*

26. I asked Mr Taylor about these latter matters during the course of the hearing, and he confirmed that he was thereby seeking to maintain that because a default judgment had been obtained, it was not necessary for 889 to comply with the unless order that had been made, of which he was plainly aware given the wording of the first of the paragraphs quoted in paragraph 25 above.

27. Having apparently considered this document dated 17 October 2018 produced by 889, on 18 October 2018 District Judge Khan made another order (sealed on 22 October 2018) that: *"If the claimant does not comply with the order of 20 September, the claim is stuck out"*. This is a somewhat odd order in that, by 18 October 2018, it was too late to comply with the order dated 20 September 2018 which required performance by 4pm on 17 October 2018. However, it is clear, in my judgment, that 889 having failed to file its Directions Questionnaire by 4.00pm on 17 October 2018, the effect was that by operation of the order made on 20 September 2018 its claim was struck out notwithstanding what might have been maintained by the document lodged by Mr Taylor timed at 4pm on 17 October 2018. At no stage thereafter did 889 seek relief from sanctions, or otherwise seek to revive the First Proceedings.

28. In emails sent following the circulation of a draft this judgment, Mr Taylor has contended that the effect of the order made on 18 October 2018 was effectively to extend the time for 889 to lodge a Directions Questionnaire indefinitely, and to nullify the effect of the order made on 20 September 2018 striking out the claim if a Directions Questionnaire was not filed by 4.00pm on 17 October 2018, but I do not read the order made on 18 October 2018 as having that effect, and do not consider that that is what District Judge Khan can have intended. I would note that no Directions Questionnaire was subsequently filed (at least until what purports to be such a document was attached

to an email dated 6 April 2021 sent in response to the draft judgment). As dealt with in detail below, the reason why 889 did not comply with the order made on 20 September 2018 or otherwise file a Directions Questionnaire was because it had decided to pursue other courses of action.

29. Contemporaneously with these events, on 18 October 2018, Mr Taylor lodged three forms at Companies House, purporting to confirm the satisfaction of the Debenture and the Mortgage over the Property in favour of the Bank as well as the release of the Property. There was no basis for lodging these forms, and the Bank made an urgent application for the rectification of the register and removal of those entries in order to avoid prejudicing the then impending sale of the Property. On 26 October 2018 an order was made in the terms sought by HHJ Hodge QC.

30. In addition, at this time Mr Taylor caused to be filed at Companies House accounts of 889 for the periods ended 30 March 2017 and 30 March 2018. Both of these sets of accounts purported to have been approved by the Board of 889 on 14 October 2018, and under the heading *"Advances and credits"*, contained a footnote in the following terms: *"MANCHESTER CHANCERY DIVISION E30MA245 ISSUED 12 APRIL 2018. SERVED ON CLYDESDALE BANK GLASGOW EIGHT AUGUST 2018. DEFAULT JUDGMENT ENTERED 22 AUGUST 2018. CYBG PLC ARE 21 DAYS TO PROVIDE AN ACCOUNT FROM APRIL 2007. AMOUNTS HELD ON PURPOSE TRUST PENDING AN ACCOUNT. HELD BY CYBG PLC PURPOSE TRUST."*

31. In paragraphs 5 to 7 of his witness statement dated 23 March 2021 in opposition to the Strike out Application, Mr Taylor said this:

> *"5. At the point [the First Proceedings] was "struck out" on a technicality, the Claimant's Managing Director and Company Secretary were fatigued, and emotionally drained, together with anxiety and post-traumatic stress, as [the Bank's] employees had gaslighted with the intention, now known, to conceal vital evidence of fraud and dishonest behaviour committed by one of its employees, [Mr Kelly].*
>
> *6. Immediately preceding the strike out of [the First Proceedings], Greater Manchester Police had disclosed to the Claimant that there was an act of fraud. That being the conclusive evidence of [Mr Kelly's] deliberate dishonesty.*
>
> *7. The "smoking gun" referred to in my previous witness statement is an internal Memo and File note, which proves beyond reasonable doubt [Mr Kelly's] deliberate dishonesty. To date these documents had not been disclosed to the Claimant or the Court in attempts to conceal evidence. Whilst the Claimant has not seen these documents, it is aware of the contents of the documents from the Greater Manchester Police.*
>
> *8. With that disclosure, the Claimant believed that with the evidence of deliberate fraud and concealing the evidence, that this matter would be appropriately dealt with by the Defendants' 'Regulator' the Financial Conduct Authority."*

32. Mr Taylor dealt with this further in paragraph 29 of his skeleton argument, where he said this:

> *"29. Once the Claimant had been informed by Greater Manchester Police of the Memo & File Note* [i.e. the 2007 Documents] *those being the "smoking gun", that being around the time of the "strike out" of [the First Proceedings], it was agreed by the Claimant's Managing Director and Company Secretary that no further time of the Court would be required as the ongoing investigation, also disgorging of the proceeds of crime would be for the National Crime Agency, and indeed the prosecutor for financial crimes, the Financial Conduct Authority, under the watchful eye of Mr Andrew Bailey and Head of Enforcement Mr Mark Steward."*

33. In the course of his submissions on behalf of 889, Mr Taylor further explained that his thinking, at the time that 889 failed to comply with the relevant unless order, was that the matters raised were more appropriate to be dealt with by a criminal court rather than a civil court, that he did not intend that 889 should abandon such claims as it had against the Bank, and that he did not realise that 889 would have had to have applied for relief from sanctions before pursuing the First Proceedings further.

34. After the events of October 2018, Mr Taylor continued to send letters and emails to a number of individuals making serious allegations of fraud and fraudulent concealment of documents by the Bank and the individuals concerned. It is the Defendants' case that, so far as Mr Kelly was concerned, it was necessary for the police to intervene and for Mr Kelly to be offered restorative justice with Mr Taylor agreeing not to contact him or his employer for a period of two years.

35. On 28 November 2020, 889 made an application for pre-action disclosure from the Bank and its former parent company. As touched upon above, this was dismissed on 27 January 2021. I refer to this application further below.

36. The present proceedings were issued on 13 December 2020, before the application for pre-action disclosure had been dealt with.

37. Notwithstanding the issue of the present proceedings, Mr Taylor has continued his campaign by correspondence, and my attention was drawn to an email dated 1 March 2021 addressed to representatives of the Bank's Solicitors and Auditors, and email addresses and individuals within the CPS, with the email also copying in a large number of other individuals within the Bank, and appearing to threaten a private prosecution.

38. Although the Bank issued the Strike Out Application on 4 February 2021, on 6 March 2021 889 impermissibly made a request for default judgment in the sum of £44 million plus consequential losses. The Court declined to allow a default judgment to be entered in the circumstances.

The issues raised by the First Proceedings

39. It is necessary to look in more detail at the issues raised by the First Proceedings.

40. 889 issued the First Proceedings on 12 April 2018, just over a year after LPA Receivers were appointed over the Property and nearly 11 years after the Property had been purchased.

41. 889's Particulars of Claim served in the First Proceedings, as settled by Counsel, contained a number of claims against the Bank arising out of 889's purchase of the Property in 2007. The relief sought by the First Proceedings included:

    i) Declaratory relief as to the rescission of all loan agreements and charges and mortgages between 889 and the Bank;

    ii) Declaratory relief concerning what was alleged to be the "*ultra vires appointment of receivers*";

    iii) Injunctive relief to restrain the appointment of receivers and their sale or other dealings with the Property;

    iv) A claim for "*an account and inquiry*"; and

    v) Damages.

42. The essence of 889's case in the First Proceedings, as previously ventilated in correspondence, was that Mr Taylor (and hence 889) had been misled into purchasing the Property with a loan from the Bank. 889 maintained that the Property was worth much less than the purchase price that it had paid in 2007, and that, if 889 had known this, it would not have proceeded to take the loan or enter into the Mortgage. It was said that the Bank had deliberately and dishonestly sought to give the impression that the Property was worth more than it knew to be the case in order to induce 889 to take out the loan with the Bank and to proceed with its purchase of the Property. In particular, 889 alleged that Mr Kelly had made some seven misrepresentations pleaded in paragraph 33 of the Particulars of Claim relating to the valuation reports that the Bank had obtained from Lamb & Swift and Morris Dean, including in respect of the First L&S Report. These reports were obtained for the Bank's own purposes when deciding whether and to what extent it was prepared to lend on the security of the Property.

43. The particular allegation in respect of the First L&S Report, as set out in paragraph 33(i) of the Particulars of Claim, was that Mr Kelly had: *"falsely represented to the Claimant that "Mr Swift would not put a value on the Property" in circumstances where Mr Swift had valued the Property in the sum of £800,000, subject to a deduction for contamination removal."*

44. Paragraph 33(viii) of the Particulars of Claim alleged that Mr Kelly had made the allegedly representations … *"knowing them to be untrue or being reckless as to whether or not they were true."*

45. The First Proceedings were robustly defended by the Bank, the Bank maintaining amongst other things that:

    i) The claims were statute barred;

    ii) 889 had decided to purchase the Property before the alleged representations were made;

iii) The alleged representations were (if made) correct or substantially correct in that Lamb & Swift did not, at least by the First L&S Report, provide a valuation that could be relied upon by the Bank since their report concluded that the Property provided "*poor security for lending purposes*";

iv) 889 was well aware before completing the purchase that the Bank had obtained valuations of the Property for less than the purchase price, and the representations alleged to have been made by Mr Kelly could not have given 889 any reassurance as to the value of the Property;

v) The Bank's express conditions of lending only required a valuation of the Property that was less than the purchase price; and

vi) 889 had made a commercial decision that despite the value of the Property being less than the purchase price, it believed nevertheless it would be able to develop the Property and realise a profit.

The pre-action disclosure application

46. As I have already mentioned, on 28 November 2020, some two years after the First Proceedings had been struck out, 889 made an application for an order for pre-action disclosure from the Bank in respect of the 2007 Documents.

47. In support of its application, 889 principally relied upon a letter sent to the Bank's solicitors on the same day that the pre-action application was issued. The letter maintained that the 2007 Documents had not been disclosed during the First Proceedings, that copies had been provided to GMP during their investigation, that the Bank had objected to them being provided to 889 by GMP, and that 889 believed that they were "*significant*". The letter did not explain how or why the documents are said to be "*significant*" save for contending that they could prove "*at least negligence*" by Mr Kelly.

48. By the time that the application came to be heard in January 2021, it had become clear that these documents were sought on the basis that 889 considered that they had been fraudulently concealed by the Bank in the First Proceedings, and continued to be so concealed by the Bank and because 889 believed them to be relevant to the claims that 889 now seeks to bring in these proceedings.

49. 889's skeleton argument and Mr Taylor's witness statement in support of 889's application were not provided until shortly before the hearing, by which time the present proceedings had been issued. The skeleton argument and witness statement, apart from making a number of serious allegations of fraud against the Respondents (the Bank and National Australia Bank) and other parties, expressly linked the pre-action disclosure application to the present proceedings and principally sought to justify the application on the basis that the documents sought represented "*the evidence that a valuation by Lamb & Swift was deliberately concealed*".

50. The pre-action disclosure application was determined by DDJ Brightwell on 27 January 2021 who dismissed it on the basis that as the present proceedings had by then been issued, he had no jurisdiction to order "pre-action" disclosure, and he considered that there was no basis to justify a departure from the usual timetable regulating when

disclosure should take place in these proceedings. There has been no appeal from this decision.

The issues raised by the present proceedings

51. The Claim Form issued on 13 December 2020 refers to 889 seeking:

> *"remedies against the first defendant [i.e. the Bank] in relations (sic) to their causation of a loss by unlawful means; that being, false accounting and/or forging documents, and/or forging signatures, failure to disclose and/or false representations and/or negligence and/or breach of duty of care and/or unjust enrichment as follows;*
> *(a) declaratory relief as to the rescission of all loan agreements and charges and mortgages between the claimant and the first defendant*
> *(b) declaratory relief as to the ultra vires appointment to the appointment of receivers*
> *(c) the return of the Woodstock Depot*
> *(d) the reconstruction of a connected business TT Express (Oldham) Ltd*
> *(e) a proper account with certified payment records of all monies moved in and out of 889 Trading Ltd bank account from 2007 to date."*

52. The Claim Form then states that the *"primary relief sought is not monetary"*, and specifies the amount claimed as *"£0.00"*.

53. As is apparent, the wide-ranging and somewhat unconventional relief claimed substantially overlaps with that sought in the First Proceedings with the addition of a claim for *"the return of"* the Property, and the *"reconstruction"* of TT Express (Oldham) Ltd.

54. 889 is not legally represented, and the Claim Form and Particulars of Claim have been prepared by Mr Taylor himself. They make a significant number of serious allegations of fraud, forgery and theft against all of the Defendants that can, I consider, properly be described as having been pleaded in a generalised and unparticularised manner. The allegations made can be placed into three broad categories, namely the allegations made against the individual Defendants (the Second to Fifth Defendants), claims made against the Bank which resemble the claims made in the First Proceedings, and queries in relation to 889's bank statements.

55. So far as the individual Defendants are concerned, it is to be noted that the Claim Form does not in terms seek any relief against them. The Particulars of Claim contain no prayer for relief, and so the relief claimed in the present proceedings must be limited to that sought as set out in the Claim Form.

56. The allegations against the individual Defendants in the Particulars of Claim can be broadly summarised as follows:

    i) Paragraph 3 alleges that they have *"breached their fiduciary duty of care and failed to uphold their published regulations"*;

    ii) Paragraphs 6, 7, 8 and 12 allege that Mr Kelly made a false representation; and

    iii) Paragraphs 16, 17 and 18 refer to correspondence involving the Third to Fifth Defendants; and

iv) Paragraphs 19, 20, 22, 23 and 24 seek to implicate the Second to Fifth Defendants in a fraud and conspiracy against 889 and/or Mr Taylor.

57. The claims in the Particulars of Claim as against the Bank focus on the alleged misrepresentations by Mr Kelly that formed the key part of the claim as formulated against the Bank in the First Proceedings, and in particular the alleged misrepresentations made by Mr Kelly in respect of the First L&S Report. Thus:

i) Paragraph 6 refers to the First L&S Report not having been disclosed to 889;

ii) Paragraphs 7 and 9 refer to Mr Kelly having informed 889 that Lamb & Swift *"would not put a value on"* the Property;

iii) Paragraph 12 asserts that Mr Kelly: "made a false representation … by failing to disclose that L&S did put a value on the Site …";

iv) Paragraph 13 further refers to the First L&S Report, referring to it having been obtained pursuant to a data subject access request on 25 May 2017 and to have given the Property a value of £800,000;

v) Paragraphs 14 to 18 refer to investigations relating to Mr Kelly's alleged misrepresentations in respect of the First L&S Report, including those of the GMP;

vi) Paragraph 21 refers to the 2007 Documents as being the *"smoking gun"* for 889's claim.

58. The final paragraph (paragraph 25) of the Particulars of Claim contains an allegation that the Bank accepts does not overlap with the First Proceedings. In essence, 889 thereby contends that the Bank has refused to give an account of *"money movements"* shown in its bank statements. Bank statements were provided with the Particulars of Claim showing a number of entries as underlined, and it is these entries that 889 seeks to query. The final paragraph of the heads of relief referred to in paragraph 51 above relates to this element of the claim.

The Strike Out Application

The Defendants' case

59. The Defendants seek to strike out the Particulars of Claim under both CPR 3.4(2)(a) and (b).

60. CPR 3.4(2)(a) provides that the court may strike out a statement of case if it appears "*that* [it] *discloses no reasonable grounds for bringing or defending the claim.*"

61. As the Bank points out:

i) The scope of CPR 3.4(2)(a) is elaborated in CPR PD 3A para 1.4, which gives examples of cases falling within that rule as including:

> *"(1) those which set out no facts indicating what the claim is about, for example "Money owed £5,000",*

(2) those which are incoherent and make no sense,

(3) those which contain a coherent set of facts but those facts, even if true, do not disclose any legally recognisable claim against the defendant."

ii) That rule must be read together with CPR 16.4(1), which stipulates that Particulars of Claim are to include "*a concise statement of the facts on which the claimant relies.*"

62. CPR 3.4(2)(b) provides that the court may strike out a statement of case where it "*is an abuse of the court's process or is otherwise likely to obstruct the just disposal of the proceedings.*"

63. The essence of the Bank's case is that the Particulars of Claim should be struck out because:

i) 889 does not seek any remedies against the Second to Fifth Defendants and there is therefore no basis for them to be parties to the proceedings.

ii) Insofar as claims are made against the Bank:

a) The substance of the claim against the Bank as advanced in the present proceedings arises out of the same complaint that Mr Taylor has been pursuing on behalf of 889 since the appointment of LPA Receivers over the Property, repeating the claims from the First Proceedings in relation to alleged misrepresentations by the Second Defendant as to the L&S First Report in circumstances in which, the First Proceedings having been struck out for failure to comply with an unless order, the bringing of the present claim amounts to an abuse of process such that the Claim Form and the Particulars of Claim should be struck out pursuant to CPR 3.4(2)(b);

b) To the extent that any claims might not overlap with those advanced in the First Proceedings, they are pleaded in insufficient detail or do not correspond to any recognisable civil causes of action. Consequently, 889's statements of case do not therefore disclose any reasonable basis for the claims brought against the Bank.

64. So far as the Second to Fifth Defendants are concerned, reliance is placed upon the way the claims for relief are expressed in the Claim Form and the Particulars of Claim, the point being made that no relief is actually being sought as against these Defendants. If that is the case then, so say the Defendants, there is no reasonable basis for bringing a claim against these Defendants.

65. So far as duplication of claims as between the First Proceedings in the present proceedings and the fact that the First Proceedings were struck out for non-compliance with an unless order is concerned, reliance is primarily placed upon the decision of the Court of Appeal in *Harbour Castle v David Wilson Ltd* [2019] EWCA Civ 505. It is said that the facts of that case are closely analogous with the facts of the present case, and that this case provides authority for the proposition that whilst non-compliance with an unless order is unlikely, in itself, to make the bringing of further proceedings an

abuse of process, the position is different where the failure to comply with the unless order is properly to be regarded as deliberate. In this case it is open to the court to find that new proceedings subsequently brought do amount to an abuse of process rendering the proceedings liable to be struck out.

66. As to whether the non-compliance with the unless order dated 20 September 2018 by the failure to file a Directions Questionnaire by 4pm on 17 October 2018 is properly to be regarded as deliberate, it is argued that:

    i) A deliberate decision was taken not to comply with the unless order, but rather to seek to rely upon the supposed default judgment dated 22 August 2018 as bringing the need for the First Proceedings to an end; and

    ii) Further, as accepted by 889 itself by its skeleton argument and Mr Taylor's witness statement dated 23 March 2021 and further comments during the course of the hearing, 889, having been informed as to the result of GMP's investigation, and with knowledge of the 2007 Documents, albeit without actual copies thereof, took the decision that rather than seeing the First Proceedings to a conclusion, it would allow the unless order to go by default, and instead let what it says it regarded as the criminal conduct on the part of the Bank that had been revealed to be pursued by other authorities, and in particular the FCA. It is said by the Defendants that this is demonstrative of a deliberate decision on the part of 889 not comply with the unless order, and let the First Proceedings go by default with a view to the matters complained of being taken up by other authorities.

67. It is thus argued by the Bank that it would be an abuse of process for 889, having taken the deliberate decision not to comply with the relevant unless order, to now seek to resurrect the claims advanced by the First Proceedings but struck out, by way of the present proceedings.

68. So far as the Bank's reliance upon CPR 3.4(2)(a) is concerned, to the extent that 889's present claim might not involve duplication of the claim advanced by the First Proceedings, it is argued that there are no complete pleas of any identifiable causes of action against the Bank contained in the Particulars of Claim.

69. The specific deficiencies relied upon are set out in paragraphs 48.1 to 48.8 of the witness statement of Adam Ibrahim dated 4 February 2021 made in support of the Strike Out Application. It is said therein as follows:

    "48.1 Paragraph 3 asserts broadly that all the Defendants "have breached their fiduciary duty, duty of care and failed to uphold their published regulations." But the Particulars of Claim do not set out the origin of the alleged fiduciary duty, the origin and content of the alleged duty of care, the basis upon which 889 could bring a claim for breach of any "published regulations" and they fail to set out any particulars of the allegation that the Defendants all breached those alleged duties.

    48.2 Paragraph 5 asserts that the contents of a customer authority form of 25 January 2007 (page 245) (which appears to be a reference to the Bank's standard form customer authority, which authorised the Bank to obtain an

independent professional valuation of the Property) "has been forged". The Particulars of Claim do not make any allegation as to what particular parts of that document it is said have been forged, the basis upon which such an allegation is made or, for example who it is said forged the document. The Particulars of Claim also do not explain why this alleged forgery is said to be of relevance to any of the remedies that 889 seeks.

48.3 Paragraph 6 contends that the Lamb & Swift valuation was not disclosed to the Claimant, without setting out the basis upon which it is contended that any of the Defendants were obliged to provide it to him.

48.4 Paragraphs 7 and 12 allege that the Second Defendant made a false representation to 889 by informing it that Lamb & Swift "would not put a value on the [Property]". This is apparently the central allegation lying behind the proceedings, yet it is not alleged who at 889 the representation was made to, the precise term of the representation, the circumstances in which that representation was allegedly made, the basis upon which it is said to have been false, or the manner in which 889 says that it relied upon that representation.

48.5 Paragraph 19 alleges that the First, Third, Fourth and Fifth Defendants "and their respective agents have posted articles for the use in fraud on statutory Government registers." But these "articles" and "registers" are not identified, nor is the alleged fraud or any recognisable cause of action said to arise from that alleged action entitling 889 to any of the claimed relief.

48.6 Paragraphs 20 and 22 similarly allege that the First, Third, Fourth and Fifth Defendants have "used malicious communications" and "conspired to deliberately conceal documents" without giving any proper particulars of those very serious allegations.

48.7 Paragraphs 23 and 24 then assert that all of the Defendants have "breached section 3 Fraud Act 2006", and "engineered the insolvency and liquidation of TT Express (Oldham) Limited and appointed LPA Receivers over the [Property] contravening the Theft Act 1968 s(17) theft by false accounting." Again, no detail is given of the basis upon which these allegations are made against the Defendants, but more fundamentally, they only refer to criminal offences and not civil causes of action that would entitle 889 to bring these proceedings."

70. In short, it is argued that the generalised assertions that the Bank was engaged in criminal fraudulent activity are so deficient that they do not provide a proper basis for the present proceedings to proceed, and that they should therefore be struck out.

71. So far as the final paragraph of the Particulars of Claim is concerned, this simply asserts that:

"25. The Claimant has noted various "money movements" from April 2007-December 2010 amounting to £21,618,359.70 in its Bank Account for which Defendant [1] refused to give an account."

72. In response to this, it is said by the Bank that no identifiable cause of action is linked to the request, nor is there any explanation as to why 889 believes that the Bank should be ordered to provide the information in question. Still less, so it is said, are any grounds stated as to why 889 believes that any of the entries are inaccurate. It is therefore submitted that there is no proper basis for a claim relating to these *"money movements"* to proceed and the claim in respect of them should be struck out.

73. It is further pointed out by the Bank that the claim is no more than a request for information, and it is submitted that any request should have been, which it was not, pursued in correspondence prior to the issue of proceedings. Notwithstanding this, the Bank has provided a detailed explanation in respect of the various transactions in a letter dated 22 March 2021. It is said that there is a straightforward explanation in respect of each of the query entries, which related to the debiting and crediting of amounts to the account upon new loan facilities replacing old loan facilities.

889's response to the Strike Out Application

74. The arguments advanced by Mr Taylor on behalf of 889 in answer to the Strike Out Application can be summarised as follows:

    i) In September 2018 he was acting in person on behalf of 889, was fatigued and battle weary, and felt *"gaslighted"* and bombarded by the Bank. He says that he made a mistake with regard to the supposed default judgment, and relied upon bad advice that he had received from others. He says that, at the time, he reasonably took the view on behalf of 889 that the matter was no longer a civil one, but rather a criminal matter that ought best to be entrusted to the relevant authorities. 889 did not intend to abandon the claims being pursued in the First Proceedings, and did not realise that the consequence of breaching an unless order was that it would be necessary to apply for relief from sanctions.

    ii) It is submitted that the present proceedings involve a new claim with new Defendants based upon what was described by Mr Taylor as *"deliberately concealed evidence"* concerning the First L&S Report, and the 2007 Documents which the Bank continued to fail to disclose, and did so notwithstanding promises said to have been made to Mr Taylor by senior Bank officials in March/April 2019. Mr Taylor placed reliance upon the maxim that *"fraud unravels everything"*, and the decision of the Supreme Court in *Takhar v Gracefield* [2019] UKSC 13, [2020] AC 450, and in particular what was said by Lord Kerr at para [55], where he said:

    > *"Where fraud has been raised at the original trial and new evidence as to the existence of the fraud is prayed in aid to advance a case for setting aside the judgment, it seems to me that it can be argued that the court having to deal with that application should have a discretion as to whether to entertain the application."*

    Although that case involved an application to set aside a judgment obtained by fraud, I understood Mr Taylor's submission to be that an analogous situation would be where proceedings are allowed to be struck out by reason of some default where the party that gained the benefit of the default judgment had

fraudulently concealed evidence, at least where that led to the other party allowing the judgment to be entered by default.

iii) So far as concerns the jurisdiction to strike out as an abuse of process pursuant to CPR 3.4(2)(b) in circumstances where there had been non-compliance with an unless order and the claimant that has been struck out seeks to bring new proceedings, Mr Taylor sought to place reliance upon *Davies v Carillion Energy Services Ltd* [2017] EWHC 3206 (QB), [2018] 1 WLR 1734 in which Morris J had at paras [52] and [55] given guidance as to the considerations to be applied in such circumstances including that a single failure to comply with an unless order is not, of itself, sufficient to conclude that the second action is an abuse of process. In addition, Mr Taylor placed reliance upon what had been said by Briggs J (as he then was) in *Wahab v Khan* [2011] EWHC 908 (Ch) where, at para [22], Briggs J had held that it was necessary to (i) analyse the claimant's conduct in the first claim and the reasons for that claim being struck out, (ii) assess the extent to which the combined effect of the first and second claims might place a disproportionate burden on the Court's resources, and (iii) balance those factors against the reasons why the claimant wished to have a *"second bite of the cherry"*. Mr Taylor submitted that, having proper regard to these considerations, this is not a proper case to strike out the present proceedings as an abuse of process.

iv) Mr Taylor made no specific submissions with regard to the adequacy of the way which the claims in the present proceedings are presently formulated, but implicitly at least rejected the submissions made on behalf of the Bank in relation thereto. He submitted that, to the extent that there was any pleading deficiency, then 889 would *"want to amend to add the tort of deceit and conspiracy by unlawful means."*

Principles to be applied

75. The principles to be applied in respect of strike out under CPR 3.4(2)(a) are well established, and as has already been pointed out CPR PD3A, para 1.4 provides examples of cases falling within the description of where a statement of case fails to disclose reasonable grounds for bringing or defending the claim.

76. Further, as has already been referred to, CPR 16.4(1)(a) provides that Particulars of Claim should include *"a concise statement of the facts on which the claimant relies."* In relation to this, the notes in the White Book 2020 at 16.4.1 make the point that the claimant should state all facts necessary for the purpose of formulating a complete cause of action.

77. I would finally observe that CPR 16 PD.8, para 8.2 requires a claimant to specifically set out a number of matters in its particulars of claim where it wishes to rely on them in support of its claim, including any allegation of fraud, the fact of any illegality, and details of any misrepresentation.

78. So far as CPR 3.4(2)(b) is concerned, and the circumstances in which the court might strike out a statement of case on the basis that it is *"an abuse of the courts process or is otherwise likely to obstruct the just disposal of the proceedings",* a helpful summary as to the general principles to be applied is provided by the very recent decision of the

Court of Appeal in *Tinkler v Ferguson* [2021] EWCA Civ 18, per Peter Jackson LJ at [26]-[35]. For present purposes, I would simply refer to the summary at para [35]:

> *"In summary, the power to strike out for abuse of process is a flexible power unconfined by narrow rules. It exists to uphold the private interest in finality of litigation and the public interest in the proper administration of justice, and can be deployed for either or both purposes. It is a serious thing to strike out a claim and the power must be used with care with a view to achieving substantial justice in a case where the court considers that its processes are being misused. It will be a rare case where the re- litigation of an issue which has not previously been decided between the same parties or their privies will amount to an abuse, but where the court finds such a situation abusive, it must act.*

79. As is apparent therefrom, the authorities necessarily draw a distinction between where the previous proceedings had been disposed of on their merits, and where they have not as in the circumstances of the present case.

80. In *Aktas v Adepta* [2010] EWCA Civ 1170, the claimant's first action was struck out for failure, due to mere negligence, to serve a claim form in time and a second action was also struck out as being an abuse of process. Rix LJ held that where a first action has been struck out for procedural failure rather than failing on its merits, then the second action would be an abuse of process only where the conduct of the first action itself amounted to an abuse of process, and that an abuse of process could only arise in the first action where there had been intentional and contumelious conduct, inordinate and inexcusable delay, or wholesale disregard of rules of court – see paras [48], [52], [72] and [90]. He thus concluded that a mere negligent failure to serve the claim form in the first action did not fall into any of these categories, and was not of itself an abuse of process.

81. Morris J applied these principles in the case of *Davies v Carillion Energy Services Ltd* (supra) relied upon by Mr Taylor in concluding that a single failure to comply with an unless order is not, in itself, sufficient to conclude that the second action is an abuse of process.

82. In *Harbour Castle Ltd v David Wilson Homes Ltd* (supra) relied upon by the Bank, the claimant had brought a first action seeking remedies in respect of an alleged breach of covenant by the defendant. Upon the failure by the claimant to comply with an order to provide security for costs, a further order was made in an unless form to the effect that the first action would be struck out without further order if, by a new date, the claimant had still not given the security previously ordered. It was not in dispute that the claimant had not itself possessed the funds to provide security, but that its sole shareholder had the resources to do so. For commercial reasons the sole shareholder did not assist the claimant to comply with the unless order, and the claim was therefore struck out when the unless order was not complied with. The claimant subsequently commenced new proceedings raising the same claims as in the first action, and the defendant applied for an order striking out the second action as an abuse of process. The Court of Appeal upheld the decision of the court below that the second action should be struck out.

83. David Richard LJ considered the relevant principles at paras [9] and [10], where he said:

> *"9. Where, as in the present case, the question is whether to strike out a second set of proceedings raising the same issues as in the first, the authorities establish that a proper basis for finding the second action to be an abuse will be shown if (but this is not intended to be an exhaustive list) the first action was struck out for a deliberate failure to comply with a peremptory order or for inordinate and inexcusable delay in its prosecution or for a wholesale disregard of the rules: see Janov v Morris [1981] 1 WLR 1389, Arbuthnot Latham Bank Ltd v Trafalgar Holdings Ltd [1998] 1 WLR 1426, Securum Finance Ltd v Ashton [2001] Ch 291, and Aktas v Adepta.*
>
> *10 In the present case, the first action was struck out for failure to comply with a peremptory order for the provision of security for costs. Such an order will not normally be made if security cannot be provided and the order would stifle a legitimate claim. On that basis, one would expect HCL's second action to be regarded as an abuse of the process."*

84. David Richards LJ then considered whether the failure to provide security for costs in that action could be said to be deliberate, the position being complicated by the decision of the Supreme Court in *Goldtrail Travel Ltd v Onur Air Tasimacilik AS* [2017] UKSC 57, [2017] 1 WLR 3014 that had made a significant change to the legal test for determining whether a claim would be stifled by an order for security for costs. David Richards LJ ultimately concluded that the failure to comply with the unless order could properly be said to be deliberate, approving the observations of the Judge below that if it had wished to do so, the claimant could have accessed funding to allow it to satisfy the security for costs order.

85. He therefore concluded that:

> *"24. The Judge was accordingly entitled to say, at [150], that HCL did not ensure that it used the opportunity provided by the first action to resolve its dispute with DWHL. Through Mr Jeans, it chose not to provide the security and so allowed the action to be struck out. It was a deliberate decision by HCL not to comply with the peremptory order for security. In my judgment, it was in those circumstances a clear abuse to commence new proceedings making the same claim. Going back to Lord Diplock's words in Hunter, it would be manifestly unfair to DWHL to subject it to a second action, when HCL had chosen to abandon the first, and would bring the administration of justice into disrepute among right-thinking people. On any footing, it was a conclusion that was properly open to the Judge and it is not suggested that he took account of* irrelevant factors or ignored relevant factors or applied wrong principles."

86. The overall conclusion that I draw from the authorities is that where a first action has been struck out by reason of the failure to comply with an unless order, whilst that is not in itself sufficient to lead to the conclusion that a subsequent action whereby the claimant seeks to have a *"second bite at the cherry"* is abusive, if a deliberate decision was taken not to comply with the unless order then that is liable to make the second action abuse, at least if it can be said that the party in question ought to have used the opportunity provided by the first action to resolve its dispute with the other party.

87. However, I consider that it is still necessary to consider with some care the circumstances in which the decision was taken not to comply with the unless order, as

against the fairness or otherwise of subjecting the other party to the second action in those circumstances, the extent to which the second action might place a disproportionate burden on the court's resources, and general considerations as to whether allowing the claimant to have a second bite at the cherry might be considered to bring the administration of justice into disrepute.

88. Thus I can foresee circumstances in which a party might be permitted to bring a second claim if, for example, a party had deliberately failed to comply with an unless order in circumstances where the other party had dishonestly failed to disclose a document if it ought to have been disclosed in the previous litigation prior to the failure to comply with the unless order. One can perhaps see that, in those circumstances, the commencement of the second claim might not be considered to be abusive, at least if the disclosure of the documents might have led the claimant to act differently so far as compliance with the unless order was concerned.

Decision

Second to Fifth Defendants

89. I agree with the Defendants' submissions that the Particulars of Claim disclose no reasonable grounds for bringing a claim against the Second to Fifth Defendants. I do so for a number of reasons:

    i) Firstly, no relief is actually sought against the Second to Fifth Defendants. As referred to above, the Particulars of Claim contain no prayer for relief. I do not regard that, in itself, to be fatal, but the difficulty is that the Claim Form specifically refers to seeking *"remedies against the first defendant"* without specifying that it is seeking remedies against the other Defendants, and then the relief that is actually sought is relief that is only really applicable as against the Bank rather than the other individual Defendants. Further, as I have mentioned, the Claim Form specifically states that the primary relief sought is not monetary relief, and specifies *"£0.00"* as the *"Amount claimed"*. It is difficult to see what other form of relief might appropriately be granted against the other Defendants apart from some form of monetary relief. I bear in mind that the function of civil litigation is to enable wronged parties to obtain remedies and relief, and not simply to ventilate grievances.

    ii) Secondly, whilst a number of allegations are made against the Second to Fifth Defendants, the allegations are made without stating the facts necessary to formulate a complete cause of action against any of them. The criticisms made in paragraph 48 of Mr Ibrahim's witness statement are, in my judgment, largely justified. An example is provided by paragraph 3 of the Particulars of Claim where there is an allegation of breach of fiduciary duty and duty of care, and of a failure to *"uphold their published regulations"*, without any proper plea as to the basis of the duties alleged, as to how the regulations are said to apply, nor as to what consequences are said to flow from the alleged breaches and failures. Further, even in the case of Mr Kelly, and the allegation of false representation in paragraph 12 of the Particulars of Claim, no case is advanced as to what the consequences of the making of the alleged false representation are said to have been. I obviously take into account the fact that 889 is not legally represented, but that does not absolve a party from complying with the necessary formalities,

and, at the end of the day, the Bank is entitled to know the case that it has to meet.

The Bank

90. It is first necessary to consider whether the Bank has made out its case that the Claim Form and Particulars of Claim ought to be struck out pursuant to CPR 3.4(2)(b) as an abuse of the court's process.

91. I am satisfied that 889 is properly to be regarded as having taken a deliberate decision not to comply with the relevant unless order requiring that a Directions Questionnaire be filed by 4pm on 17 October 2018. It may be that 889, acting by Mr Taylor, was under some pressure regarding the litigation by late September/early October 2018, but this was no doubt contributed to by the fact that it is made an unsuccessful application for an injunction to restrain the sale of the Property, and had had a significant award of costs made against it in respect of that application which it had not complied with. 889 had a choice whether to comply with the unless order or not, and the evidence demonstrates clearly that it chose not to do so and to pursue different courses of action, namely:

    i) To seek to rely upon the supposed default judgment as against the Bank when it must have been known by My Taylor that this was not an order that had been made by the Court. Not only was the default judgment relied upon in the document dated 17 October 2018 that the Court considered the following day, but it was relied upon in accounts filed at Companies House that purported to have been approved on 14 October 2018 and, as referred to above, on 18 October 2018 forms were lodged by Mr Taylor at Companies House that purported to confirm the satisfaction of the Debenture and the Mortgage.

    ii) Perhaps more significantly, to pursue an alternative course of action than continuing with the First Proceedings to seek to have its grievances ventilated and resolved, namely by entrusting the various matters to the prosecuting authorities and the FCA, and it is, in my judgment, highly significant that it is only as a result of the latter not taking action to the satisfaction of Mr Taylor and 889 that it has sought to return to this Court to attempt to resurrect by the present proceedings its core claim that had been advanced in the First Proceedings.

92. It may be that 889 might not have appreciated the need to apply for relief from sanctions, or intended to have abandoned its claims as such, however the reality of the position is that 889 had the opportunity provided by the first action to have its dispute with the Bank resolved, but chose not to pursue that opportunity in the face of an unless order that clearly provided that the First Proceedings would be struck out if that order was not complied with.

93. Mr Taylor, of course, maintains on behalf of 889 that fraud unravels all. However, the principle that fraud unravels all does not mean that a party can simply allege fraud and use that to justify conduct that might otherwise have been regarded as abusive. As I see it, the principle that fraud unravels all generally has to be applied within the context of some recognised claim or cause of action that is pursued as such, such as deceit or seeking to have a judgment set aside on the grounds that it had been obtained by fraud.

94. Consequently, the mere fact that the First Proceedings might been founded upon an allegation of deceit, does not, in itself, make a second action, brought in circumstances such as the present where an unless order has deliberately not been complied with, any less abusive.

95. Mr Taylor further maintains on behalf of 889 that the Bank has been guilty of fraudulent non-disclosure in respect of the 2007 Documents, and that that, in some way, justifies the commencement of the present proceedings. Applying the principles considered above, I can see that if, say, the Bank had failed to disclose the 2007 Documents notwithstanding having been required to do so by an order for disclosure made in the First Proceedings, and the 2007 Documents had only come to light following a deliberate decision not comply with the unless order in circumstances in which a different decision might been taken in respect thereof had the 2007 Documents been disclosed, then 889 might have a good case for saying that conduct that might otherwise be regarded as abusive was not.

96. However, this is not, in my judgment, such a case or, more generally, a case where it can fairly be said that any conduct by the Bank in respect of the 2007 Documents has the result that conduct by 889 that might otherwise be regarded as abusive should not be so regarded.

97. I reach this conclusion having regard to the following matters in particular:

    i) One of the 2007 Documents was specifically referred to in the Banks Defence in the First Proceedings;

    ii) The First Proceedings had not reached the disclosure stage by the time that 889 failed to comply with the relevant unless order, and there is no reason to believe that the 2007 Documents would not have been disclosed in the ordinary course in the First Proceedings;

    iii) The 2007 Documents were provided to GMP and specifically referred to in their Investigation Summary;

    iv) Mr Taylor was made aware of the latter by the GMP, and as is apparent from paragraph 11 of the skeleton argument prepared by Mr Taylor and paragraph 5 et seq of Mr Taylor's witness statement dated 23 March 2021, and as was further explained by Mr Taylor during the course of the hearing, it was the matters mentioned in the Investigation Summary, including the *"smoking gun"* provided by the 2007 Documents as referred to in paragraph 7 of his witness statement, that led to the decision not to comply with the unless order and, instead, to pursue matters through the prosecuting authorities and the FCA.

    v) As Mr Taylor clarified during the course of submissions, his real purpose in seeking disclosure of the 2007 Documents is to provide the evidence to support 889's case, rather than to clarify the existence of these documents or what they say (as already described in GMP's Investigation Summary).

98. In the circumstances, I conclude that:

i) 889 is, by the present proceedings, essentially seeking to bring before the Court the issues the subject matter of the First Proceedings struck out in consequence of the failure to comply with the relevant unless order. At the heart of the present proceedings is a deceit claim based on representations alleged to have been made by Mr Kelly in respect of the First L&S Report that formed the subject matter of the First Proceedings. It may be that this claim is now more widely expressed in terms of conspiracy and the involvement of others, but it is essentially the same core complaint, and the claim against the other Defendants is subject to the difficulties that I have already identified.

ii) A deliberate decision is properly to be regarded as having been taken by 889 not to pursue the opportunity provided by the First Proceedings to seek appropriate remedies in relation to the matters now complained of in the present proceedings, and to adopt a different course.

iii) For the reasons that I have given, I do not consider there to be any proper basis for saying that any suppression of the 2007 Documents by the Bank serves makes the present proceedings any less abusive than they otherwise ought properly to be regarded as being.

iv) In my judgment, it was a clear abuse for 889 to commence the present proceedings, and I consider that it would be manifestly unfair the Bank to subject it to a further claim.

v) Further, particularly having regard to the purpose behind peremptory orders, I consider that it would bring the administration of justice into disrepute amongst right-thinking people for 889, having taken the deliberate decision that it did in respect of the unless order, to be permitted to resurrect its claims by way of the present proceedings.

99. I am mindful that even if abuse of process is demonstrated, as I consider that it has been in the circumstances of the present case, that I still have a residuary discretion as to whether to order that the Claim Form and Particulars of Claim be struck out pursuant to CPR 3.4(2)(b). However, I am satisfied that, on the present facts, I should exercise my discretion in favour of strike out.

100. As I have referred to above, the final paragraph (paragraph 25) of the Particulars of Claim does raise an issue that was not raised in the First Proceedings. However, I am satisfied that the Bank's objections in relation thereto are well founded. Paragraph 25 of the Particulars of Claim, whilst referring to *"money movements"* and alleged refusal to give an account, does not plead any factual basis for the particular obligation to account, nor the alleged refusal. In fact, this particular claim was not preceded by any letter before action seeking explanations which were not provided, and although the particular challenged transactions were identified by reference to bank statements, the Bank has, by its letter dated 22 March 2021 provided a detailed explanation that Mr Taylor has not, on behalf of 889, subsequently sought to cogently challenge. In the circumstances, I do not consider the paragraph 25 adds anything further to the claim.

101. To the extent that issues raised by the Particulars of Claim are not properly to be regarded as having formed the subject matter of the First Proceedings, the question arises as to whether the Claim Form and the Particulars of Claim, to the extent that they

deal with these issues and to the extent that strike out pursuant to CPR 3.4(2)(b) might not be appropriate, ought to be struck out pursuant to CPR 3.4(2)(a).

102. I am satisfied that the relevant parts of the Claim Form and Particulars of Claim ought to be struck out on this further basis.

103. In short, as I have already identified, it is incumbent upon a claimant by its Particulars of Claim to plead a case that contains a concise statement of facts on which it relies, and Particulars of Claim are liable to be struck out if they, amongst other things, fail to set out sufficient facts to indicate what the claim is about, are incoherent and makes no sense, or do not disclose any legally recognisable claim against the defendant.

104. I am satisfied that the criticisms of the Particulars of Claim as contained in paragraph 48 of Mr Ibrahim's witness statement are well-made, and I repeat what I said in paragraph 89(ii) above in respect of the claims as advanced against the Second to Fifth Defendants.

105. Again, I recognise that 889 appears without legal representation, but this does not excuse a failure to comply with procedural rules, and the Bank is entitled to know the case that it has to meet.

106. I have considered whether the Particulars of Claim can be saved by the suggestion that they be amended to include a claim of deceit and conspiracy by unlawful means. However, the Particulars of Claim already include a claimant deceit, if not also of conspiracy by unlawful means, and no attempt has been made to formulate a properly articulated case in that respect notwithstanding that 889 has been on notice of the detail of the objections to the Particulars of Claim since they were dealt with at length in Mr Ibrahim's witness statement.

107. In the circumstances, I am satisfied that the Claim Form and Particulars of Claim ought to be struck out pursuant to CPR 3.4(2)(a) to the extent that they do raise claims that were not advanced in the First Proceedings.

Conclusion in respect of Strike Out Application

108. On the various grounds identified above I am satisfied that the Claim Form and the Particulars of Claim ought to be struck out pursuant to CPR 3.4(2).

<u>Disclosure Application</u>

109. In view of my finding in respect of the Strike Out Application, I can take my findings in respect of the Disclosure Application relatively shortly.

110. By the Disclosure Application, disclosure is sought pursuant to *"CPR part 31/Bankers Book Evidence Act 1879"*. It is apparent that, so far as the Bankers Book Evidence Act 1879 ("**the 1879 Act**") is concerned, 889 relies upon s. 7 thereof.

111. In essence, what 889 appears to be seeking is disclosure of the 2007 Documents and the provision of *"standard disclosure"* in the present proceedings – see paragraph 61 of Mr Taylor's witness statement in support of the application, and box 10 of the Application Notice.

112. So far as 889 seeks to invoke s. 7 of the 1879 Act, it is to be noted that:

    i) It can only be invoked on the application of *"a party to legal proceedings"*;

    ii) There is very recent authority to the effect that the 1879 Act is of very narrow application, and does not extend to the categories of documents sought by 889, being limited to *"Bankers' books"*, which is defined by s. 9 as *"ledgers, tables, cash books, account books, and all other books used in the ordinary of business of the bank."* In *Meng v HSBC Bank Plc* [2021] EWHC 332 (QB) at [23-24], Fordham J held that the 1879 Act was never concerned to cover everything that a bank has, or does, or writes down, in the ordinary course of business as a bank, and its scope would not extend, for example, to include an attendance note of conversation with the customer or prospective customer, or correspondence between the bank and the customer or prospective customer.

113. So far as 889 seeks to invoke CPR part 31, it is to be noted that disclosure in the Business and Property Courts now falls within the Disclosure Pilot provided for by CPR Practice Direction 51U. The application must therefore be regarded as one for early extended disclosure.

114. The short answer to the Disclosure Application is that if, as I have found, the Claim Form Particulars of Claim ought to be struck out, the consequence would be that the present proceedings would be dismissed and there would be no outstanding proceedings within which to make an application pursuant to s. 7 of the 1879 Act, or for extended disclosure.

115. In any event, on the basis of the above authority, the documentation sought falls outwith the scope of s. 7 of the 1879 Act, not properly falling within the definition of *"Bankers books"*. Further, so far as an application for early extended disclosure is concerned, the authorities are clear to the effect that disclosure in a general sense will only be ordered ahead of the close of pleadings in exceptional circumstances – see e.g. Matthews and Malek, Disclosure, 5th edition at paragraph 2.32. In my judgment the present circumstances cannot properly be described as exceptional particularly bearing in mind that 889 is already on notice of the essential contents of 2007 Documents.

116. In all the circumstances, I find that the basis for the Disclosure Application is not made out, and that it ought therefore to be dismissed.